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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MAGCO DRILLING INC. et al., Plaintiffs, Cross-defendants and Respondents, v. STEVE NEVILLE et al., Defendants, Cross-plaintiffs and Appellants.

A157194

(Alameda County Super. Ct.
No. RG13687945)

Steve Neville and Substructure Support, Inc. (SSI) appeal from an order denying their post-judgment motion for attorney fees and costs pursuant to Civil Code section 1717.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Magco Drilling, Inc. (Magco), MCM Enterprises, Inc. (MCM), and Michael Maggio sued Neville and SSI in March 2013.² The Magco parties' original complaint generally alleged the parties orally negotiated and agreed

¹ Further statutory references are to the Civil Code.

² For the sake of brevity, we will sometimes collectively refer to Magco, MCM, Michael Maggio, and/or Holly Maggio as "the Magco parties," and to SSI and Neville as "the SSI parties." Subsequent references to Michael Maggio and Holly Maggio will use their first names only.

in March 2011 to sign a written agreement containing various terms for the sale of SSI's operating assets, the sale of Neville's Torque Down Pile (TDP) patent, and an employment agreement between Magco and Neville. The complaint further alleged that the parties never signed a written agreement because of Neville's "stalling tactics," that the SSI parties only partially performed on the oral agreement, and that the SSI parties repudiated the oral agreement regarding the sale of the patent. The Magco parties alleged numerous causes of action, including breach of oral contract and fraud.

In mid-2016, the SSI parties moved for summary adjudication of several of the Magco parties' causes of action, arguing in part that the complaint itself was defective. In mid-2017, the trial court denied that motion without prejudice. The court stated it was troubled by the Magco parties' apparent concession that the parties intended to reduce the terms of their oral agreement to writing, stating the Magco parties "must give consideration to their ability to prove that an oral contract existed under these circumstances." The court further found the oral contract claim was unduly vague, ambiguous, and uncertain because the Magco parties did not clearly identify the contracting parties. Believing the complaint was poorly drafted, the court exercised its discretion to treat the motion as a motion for judgment on the pleadings, which it granted with leave to amend.

Thereafter, the Magco parties filed the operative second amended complaint (complaint). The complaint's introductory and general allegations focused on three separate and severable oral contracts the parties allegedly sealed with a handshake after verbal negotiations around March 2011. Similar to the allegations of the original complaint, the subjects of these oral contracts were the sale of SSI's equipment, the sale of Neville's TDP technology and patent, and an employment agreement between Neville and

Magco. The oral agreements also included other miscellaneous terms, e.g., providing that the parties agreed to work on construction projects together until the oral contracts were reduced to writing and signed. The complaint also alleged that around March 31, 2011, the Magco parties had their attorneys memorialize the parties' oral contract in a document titled "Summary Agreement Re SSI Purchase" (hereafter "Summary Agreement"), but Neville never signed it. The Summary Agreement, which was attached to the complaint, contained the following clause: "In the event the parties have a dispute over the terms of this agreement, the prevailing party will be entitled to attorney's fees and costs."

Based on the foregoing allegations, the complaint set forth causes of action for breach of the oral contract regarding the sale of the TDP patent, fraud concerning Neville's refusal to assign Michael the TDP patent rights, unjust enrichment, accounting based on the alleged breach of the oral contract regarding the TDP patent, and declaratory relief regarding the ownership of the TDP patent. In their prayer for relief, the Magco parties sought "reasonable attorney's fees" for all causes of action without specifying a source for the request.

In sustaining the SSI parties' demurrer to the Magco parties' breach of oral contract claim, the trial court concluded the allegation that the parties agreed on definite terms to three oral contracts was inconsistent with the original complaint's allegation of a single oral agreement. More significantly, the allegation that the parties agreed on definite terms to three separate oral agreements was contradicted by the Summary Agreement, which stated the "agreement would be 'binding and enforceable' upon the contemplated execution of the agreement by all parties." The court also sustained the demurrer as to the fourth cause of action for an accounting because it

depended on the Magco parties' first cause of action, but it overruled the demurrer as to all remaining causes of action.

Following entry of judgment after trial in 2018, the SSI parties filed a motion pursuant to section 1717 seeking \$274,672.50 in attorney fees, plus \$31,150.71 in costs, based on the attorney fees provision in the Summary Agreement attached to the Magco parties' complaint. The trial court denied that motion on the grounds that (1) the Magco parties' asserted contract claim did not allege the parties agreed upon an attorney fees clause and (2) none of the original or amended complaints filed by the Magco parties included a prayer for an award of contractual attorney fees. The SSI parties appealed.

DISCUSSION

Relying on section 1717, the SSI parties argue they are entitled to attorney fees and costs because they prevailed against the Magco parties' causes of action seeking to enforce the Summary Agreement, which contained an attorney fees and cost provision.³ The Magco parties disagree, contending their contract-based causes of action sought only to enforce the oral contract negotiated and agreed upon between Michael and Neville as part of their handshake deal a month before the unsigned Summary Agreement was even drafted.

³ Although their appellate briefing is less than clear on the point, the SSI parties' attorney fees motion identified the Magco parties' first cause of action for breach of oral contract, fourth cause of action for a related accounting, and fifth cause of action seeking declaratory relief regarding ownership of the TDP patent as claims "on a contract" for section 1717 purposes. We construe the claim in this appeal to concern the same three causes of action.

This dispute concerns whether the criteria for an award under section 1717 are satisfied, which is an issue of law requiring de novo review. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213.)

Section 1717, subdivision (a), provides: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.” This statute “has been interpreted to ensure mutuality of remedy for attorney fee claims,” meaning that “a plaintiff is liable for contractual attorney’s fees where ‘a *defendant* sued on a contract with a provision awarding attorney’s fees to the prevailing party defends by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of that contract.’” (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 903.)

A cause of action is “on a contract” for purposes of section 1717 if (1) it “arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party’s rights or duties under the agreement” *and* if (2) “the agreement contains an attorney fees clause.” (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 241–242 (*Barnhart*).) Relevant factors for making this determination include “‘the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party’s recovery.’” (*Hyduke’s Valley Motors v. Lobel Financial Corp.* (2010) 189 Cal.App.4th 430, 435 (*Hyduke’s Valley Motors*).)

Here, the Magco parties' pleadings demonstrate its contract causes of action sought to enforce the oral contracts between the parties, not the Summary Agreement.

Briefly, and because it was the operative pleading for four years from 2013 to 2017, we note the Magco parties' original complaint concerned the parties' alleged oral agreement but did not mention or attach the Summary Agreement. And though the original complaint alleged the parties would sign a written agreement, no written agreement was ever signed. Moreover, the original complaint included no suggestion that the alleged oral agreement contemplated a provision for attorney fees or costs.

Turning to the operative amended complaint, the introductory and general allegations describe, at length, three separate and severable oral contracts—i.e., for the sale of SSI's equipment, the sale of Neville's TDP technology and patent, and an employment agreement between Neville and Magco—that the parties sealed with a handshake after verbal negotiations around March 2011. These allegations asserted that the Magco parties relied on and performed its obligations under the oral contracts, while the SSI parties materially breached them. The allegations also sought specific performance and a declaratory judgment “decreeing the assignment of all TDP patent and related technology rights to [Michael] as set forth in the terms and conditions of *the oral agreement*.” (Italics added.) None of the introductory and general allegations asserted the oral contracts provided for attorney fees or costs.

Among the more than two dozen paragraphs containing the introductory and general allegations, the Summary Agreement is mentioned in just four of them. The first mention appears in a paragraph alleging the Summary Agreement was prepared because Michael wanted to memorialize

the parties' oral contract, and Neville breached the terms in the Summary Agreement. The second mention appears in a paragraph alleging the Magco parties fully performed under the oral contracts by paying the SSI parties \$1,673,203.32, which included a \$425,000 down payment and \$20,000 monthly payments "called for by the Summary Agreement." The third mention is an allegation that the Magco parties reasonably relied "on the three separate oral contracts as memorialized in the Summary Agreement." The fourth mention appears in a paragraph again alleging that the Magco parties fully performed under the oral contracts, that Neville persistently tried to renegotiate to obtain more money, and that "any value above and beyond what was paid pursuant to the Summary Agreement was due to [the Magco parties'] efforts alone."

Despite these mentions of the Summary Agreement, the clear focus of the introductory and general allegations is on the formation, performance, and breach of the oral contracts. This focus persists in the remaining allegations set out under the headings of specific causes of action. Indeed, among the three dozen or so remaining paragraphs containing allegations, the Summary Agreement is mentioned only once. Specifically, under the heading of the first cause of action for breach of oral contract, the Magco parties allege they "fully performed their duties under the oral contract to purchase the TDP patent and related technology by paying the \$325,000 orally agreed upon *and* stated in the Summary Agreement plus any amounts owed to . . . Neville as earn out payments." (Italics added.) Despite this conjunctive allegation, the Magco parties' cause of action for breach of oral contract seeks a remedy only for breach of the oral agreement regarding the sale of the TDP patent. This is repeated in the Magco parties' final prayer for relief asking for specific performance in accord with the terms of the oral

agreement concerning the sale of the TDP patent or damages for breach of the oral contract. The final prayer does not mention the Summary Agreement at all.

Viewing the operative complaint as a whole, it cannot be said the Magco parties were seeking to enforce the terms of the Summary Agreement. The gravamen of the Magco parties' contract causes of action was to obtain a remedy for the breach of the oral agreements, specifically the oral contract regarding the sale of the TDP patent. (*Hyduke's Valley Motors, supra*, 189 Cal.App.4th at p. 436.)

Relying primarily on *Barnhart, supra*, 211 Cal.App.4th 230, the SSI parties contend the requirements for an award of attorney fees are met here. We find that case distinguishable.

In *Barnhart*, Barnhart, a general contractor received a subcontract bid from "CMC" that allegedly "would 'remain in force for thirty days . . . unless accepted by [Barnhart] or withdrawn by [CMC],' and contained a space for Barnhart to indicate acceptance by signature." (211 Cal.App.4th at p. 234.) Barnhart never signed the bid but used CMC's price to prepare its bid for the subject project. (*Ibid.*) About a month and a half later, Barnhart sent CMC a letter of intent and proposed subcontract that included a price and terms different from CMC's bid. (*Ibid.*) CMC did not sign Barnhart's proposed subcontract, but months later sent its own subcontract to Barnhart with terms consistent with its original bid. (*Ibid.*) Barnhart did not sign CMC's proposed subcontract. (*Id.* at pp. 234–235.) Barnhart substituted in a new subcontractor and thereafter sued CMC on theories of breach of contract and promissory estoppel to recover the excess amount it paid the substitute subcontractor. (*Id.* at p. 235.)

In its breach of contract cause of action, Barnhart alleged it accepted CMC's original subcontracting bid, which resulted in a contract that CMC breached. (*Barnhart, supra*, 211 Cal.App.4th at p. 235.) In its promissory estoppel cause of action, Barnhart alleged it relied on CMC's original bid when bidding on the construction project, but CMC refused to honor its bid. (*Ibid.*) Barnhart attached CMC's bid to the complaint and incorporated its terms by reference into both the breach of contract and promissory estoppel claims. (*Ibid.*) After a bench trial, the trial court found the parties never entered into a contract and rejected Barnhart's breach of contract claim. (*Ibid.*) The court, however, found Barnhart relied to its detriment on CMC's bid and awarded damages to Barnhart. (*Ibid.*) Post-judgment, the trial court denied CMC's motion for attorney's fees under section 1717 based on an attorney fees provision in its original bid. (*Barnhart*, at pp. 235–236.)

In defending the trial court's denial of attorney fees, Barnhart contended it did not sue to enforce CMC's *original bid*, but instead sued for breach of CMC's *subcontract*, which Barnhart contended had no attorney fees provision. (*Barnhart, supra*, 211 Cal.App.4th at p. 238.) The Court of Appeal rejected that contention, observing that Barnhart's complaint had attached CMC's original bid and incorporated the bid's terms by reference in its breach of contract allegations. (*Ibid.*) The court concluded CMC was entitled to contractual attorney fees because Barnhart's contract cause of action was in substance based on CMC's original bid containing the attorney fees provision. (*Id.* at pp. 238–239.) As the court observed, “the terms of the alleged ‘CMC Subcontract’ that Barnhart sought to enforce against CMC were necessarily those of CMC's [original] bid *because Barnhart defined the ‘CMC Subcontract’ as the contract formed by acceptance of that bid.*” (*Id.* at p. 238, italics added.)

In contrast to the situation in *Barnhart*, the allegations in the complaint here described at length, and substantively concerned, the alleged oral contracts that arose from the parties' handshake dealings. The Magco parties did not allege the Summary Agreement constituted a separate offer accepted by the SSI parties. To the contrary, the Magco parties specifically alleged that Neville never executed the Summary Agreement through his "continuous and fraudulent stalling tactics" and that "[i]n the end, no final agreement was ever reached that would have superseded the original *oral contract* covering [the] sale of the TDP patent and related technology." (Italics added.) We reject the SSI parties' misplaced reliance on *Barnhart*.

Highlighting the complaint's allegation that the Summary Agreement was drafted to memorialize the oral agreements, the SSI parties contend the oral agreements must have also included an attorney's fees and costs provision. We are unpersuaded. The reach of that allegation is vague, and it is unclear whether all or merely some of the terms in the Summary Agreement were part of the parties' final oral agreements. The lengthy description of the oral contracts is devoid of any allegation that Neville and Michael verbally negotiated an attorney fees provision.

The SSI parties also point to the complaint's prayer for "reasonable attorney's fees" as to all causes of action, and argue the only basis for seeking attorney fees is the contractual provision in the Summary Agreement. We reject this for the reasons already discussed concerning the gravamen of the contract causes of action. Additionally, it does not follow from the generic attorney fees prayer request that the Magco parties sought to enforce the Summary Agreement.⁴ (Cf. *Bear Creek Planning Committee v. Ferwerda*

⁴ The Magco parties' original complaint also included a generic request for attorney fees "to the extent provided for by law" as to the third "cause of

(2011) 193 Cal.App.4th 1178, 1188 [“For a losing plaintiff to be required to pay attorney fees, the plaintiff’s ‘bare *allegation* that [h]e is entitled to receive attorney’s fees [is] not . . . sufficient’; he also had to have established the attorney fees clauses ‘*actually* entitled’ him to recover fees.”].)

Beyond discussion of the operative pleading, the SSI parties contend the Magco parties made statements throughout the litigation reflecting their attempt to enforce the terms of the Summary Agreement. These include statements made by Michael and Holly in declarations responding to the court’s request for documents concerning the alleged sale of SSI’s assets and Neville’s TDP technology and in Michael’s declaration opposing the SSI parties’ motion for summary adjudication. We do not agree. Viewed in context, the Magco parties did not rely on any of the declaratory statements to enforce the Summary Agreement, and none was used to articulate or prosecute their oral contract claims. The same is true for other documents and portions of transcripts the SSI parties cite.

Indeed, the SSI parties’ own documents in the record acknowledge that the Magco parties’ claims sought to enforce the oral agreement, not the Summary Agreement. Specifically, the SSI parties’ demurrer acknowledged that the Magco parties’ first cause of action alleged an oral contract between Michael and Neville for the sale of the TDP patent and that the fourth cause of action for an accounting sought to “ ‘show the amount of [the SSI parties’] liability . . . pursuant to the oral contract’ ” regarding the sale of the patent rights.

Finally, the SSI parties challenge the trial court’s stated reasons for denying their motion, arguing “[t]he trial court’s reasoning is not supported

action” for “specific performance” without specifying any basis for an attorney fees award.

by the pleadings, the language of Civil Code section 1717, case law, or policy considerations.” We need not address this, because we review the court’s decision, not its reasoning. (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.)

For the reasons stated, we conclude the trial court did not err in denying the SSI parties’ motion for contractual attorney fees and costs.

DISPOSITION

The order of the trial court denying the SSI parties’ motion for attorney fees and costs pursuant to section 1717 is affirmed. The Magco parties shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)–(2).)

FUJISAKI, J.

We concur.

SIGGINS, P.J.

JACKSON, J.

(A157194)